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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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8 FRANK M. PECK,

9 Plaintiff,

10 v.

11 JENNIFER DORSEY, C.B. KIRSCHNER,

12 and JOHN AND JANE DOE

13 ATTORNEYS,

14 Defendants.
15

No. 2:19-cv-01023-SAB

**ORDER DISMISSING ACTION
PURSUANT TO 28 U.S.C.
§ 1915A**

16 Before the Court are Plaintiff's Amended Complaint, ECF No. 14, Motion
17 for Temporary Restraining Order, ECF No. 15, and Motion for Preliminary
18 Injunction, ECF No. 16. Plaintiff is representing himself *pro se* and Defendants
19 have not made an appearance. This matter is—essentially—a collateral attack on
20 Plaintiff's ongoing habeas petition before Defendant Judge Dorsey. Having
21 considered Plaintiff's motions, the record in this case, and applicable law, the
22 Court dismisses Plaintiff's motions *sua sponte* pursuant to its screening authority
23 under 28 U.S.C. § 1915A.

24 **Facts**

25 Plaintiff filed an amended *pro se* § 1983 complaint on August 29, 2019,
26 seeking a temporary restraining order and a preliminary injunction against Judge
27 Dorsey, Ms. Kirschner (his appointed attorney from the Federal Public Defenders
28 for the District of Nevada), and various anonymous John and Jane Doe attorneys.

1 ECF No. 14. All of Plaintiff's claims against the Defendants arise from their
2 involvement in Plaintiff's pending habeas petition before Judge Dorsey, *Peck v.*
3 *Williams*, Case No. 17-cv-01620.

4 Plaintiff alleges that Judge Dorsey "violated [his] 'anti-interference right' in
5 presentation of [his] const[itutional] and habeas claims," violated his First
6 Amendment right to petition the federal government for redress of grievances, and
7 violated his Fourteenth Amendment right to due process. *Id.* at 2. In particular,
8 Plaintiff alleges that Judge Dorsey violated his First Amendment rights by
9 appointing Ms. Kirschner to be his attorney over his objections and that the
10 appointment was done as retaliation for exercising his right to litigate. *Id.* In
11 addition, Plaintiff alleges Judge Dorsey violated his rights by failing to screen his
12 habeas petition pursuant to the rules governing review of § 2254 petitions. *Id.* at
13 4-5. Finally, Plaintiff alleges that Judge Dorsey violated his right to litigate without
14 interference when she designated him a "restricted filer" in his habeas case. *Id.*

15 Plaintiff alleges that Ms. Kirschner violated his right to litigate without
16 interference by appearing in his habeas case without his authorization. *Id.* at 6. In
17 addition, Plaintiff alleges that Ms. Kirschner violated the Nevada Rules of
18 Professional Conduct by citing capital punishment cases as authority for her
19 representation and by failing to address facts regarding the DNA evidence
20 introduced against him in his habeas case. *Id.* Plaintiff raises similar claims against
21 the Doe Defendants but does not provide additional facts for these claims. *Id.* at 7.

22 Plaintiff seeks injunctive relief, removal of counsel and restoration of his *pro*
23 *se* status, removal of Judge Dorsey from his habeas case, and that a new judge be
24 assigned to his habeas case. *Id.* at 10. In addition, Plaintiff requests that the new
25 judge appointed to his case screen his habeas petition as provided by the Rules
26 Governing § 2254 Cases. Finally, Plaintiff requests that Ms. Kirschner and the Doe
27 attorneys be referred to the Nevada Bar Association for sanctions.

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Upon review, the court shall identify cognizable claims or *sua sponte* dismiss the complaint (or any portion of the complaint) if the complaint is (1) frivolous, malicious, or fails to state a claim upon which relief can be granted or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). A complaint is frivolous if it is not grounded in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), *superseded in part by statute as stated in Lopez v. Smith*, 203 F.3d 1122 (2000). A complaint is malicious if it was filed with the intention or desire to harm another. *Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016).

ORDER DISMISSING CASE PURSUANT TO 28 U.S.C. § 1915A * 3

1 action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must plead
2 “enough facts to state a claim that is plausible on its face.” *Id.* at 570.

3 *Pro se* complaints are construed “liberally” and should generally be
4 dismissed without prejudice unless it is absolutely clear that deficiencies in the
5 complaint cannot be cured by amendment. *Nordstrom*, 762 F.3d at 908. (*citing*
6 *Silva v. Di Vittorio*, 658 F.3d 1090, 1101 (9th Cir. 2011)). If the court determines
7 that any of the § 1915A(b) grounds are satisfied, it must dismiss the case and enter
8 a “strike” against the plaintiff prisoner. *Byrd v. Phoenix Police Dep’t*, 885 F.3d
9 639, 641 (9th Cir. 2018).

10 **42 U.S.C. § 1983**

11 Plaintiff’s claims against Defendants are presented as § 1983 claims. Section
12 1983 provides a cause of action against a person acting under color of state law for
13 violations of rights guaranteed by the federal Constitution or federal law. *Pistor v.*
14 *Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). A person acts under color of state
15 law where she has “exercised power possessed by virtue of state law and made
16 possible only because the wrongdoer is clothed with the authority of state law.”
17 *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal quotations omitted). Conduct that
18 amounts to state action for purposes of the 14th Amendment is conduct under the
19 color of state law for purposes of § 1983. *Id.* at 49; *Lugar v. Edmondson Oil Co.*,
20 457 U.S. 922, 935 (1982). Federal officials and employees are “persons” for
21 purposes of § 1983 if they conspired with or worked in concert with state officials
22 under color of state law to deprive a person of her federal rights. *Cabrera v.*
23 *Martin*, 973 F.2d 735, 741 (9th Cir. 1992). However, federal employees acting
24 pursuant to federal law are not acting “under color of state law” and are not proper
25 defendants in a § 1983 action. *Billings v. United States*, 57 F.3d 797, 801 (9th Cir.
26 1995).

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Discussion

First, the Court has jurisdiction to screen Plaintiff's complaint and motions pursuant to § 1915A. Plaintiff is currently incarcerated at the High Desert State Prison in Indian Springs, Nevada. He falls into the Prison Litigation Reform Act's definition of a "prisoner."

Having determined that the Court has authority to screen Plaintiff's petition, the Court now turns to Plaintiff's claims against each Defendant. For the reasons discussed below, the Court concludes that Plaintiff's claims should be dismissed *sua sponte* because his complaints fail to state claims for which relief can be granted.

1. Claims Against Judge Dorsey

Plaintiff alleges that Judge Dorsey violated his First and Fourteenth Amendment rights by appointing him counsel against his wishes, classifying him as a restricted filer in his underlying habeas case, and for failing to screen his habeas petition pursuant to Rule 4 of the Rules Governing § 2254 Cases. ECF No. 14 at 2. In particular, Plaintiff alleges that Judge Dorsey has violated his right to litigate without active interference. *Id.* at 3 (*citing Silva*, 658 F.3d 1090, *overruled on other grounds by Coleman v. Tollefson*, -- U.S. ---, 135 S. Ct. 1759 (2015)). Plaintiff also alleges that Judge Dorsey has abused her discretion by not screening his habeas petition in a timely manner.

Plaintiff's allegations against Judge Dorsey fail to state a claim for which relief could be granted because he does not meet the requirements of a § 1983 claim. First, Plaintiff does not allege that Judge Dorsey acted under color of state law; rather, Judge Dorsey acted pursuant to federal law to appoint him counsel and to designate him a restricted filter. Second, Plaintiff has failed to show that Judge Dorsey is a "person" for purposes of § 1983. Judge Dorsey is a federal employee and Plaintiff introduced no evidence that she acted in concert with state employees, officers, or agencies to deprive Plaintiff of any federal right. In addition, as a

1 federal judge, Judge Dorsey is protected from suit by the doctrine of judicial
2 immunity. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Judge Dorsey’s act of
3 appointing Plaintiff counsel is undoubtedly a judicial act and she is absolutely
4 immune from liability for this act. *Id.* (finding that judges are immune from suit for
5 actions taken in their judicial capacity). Therefore, because Plaintiff fails to meet
6 the requirements of a § 1983 claim, Plaintiff fails to state a claim under
7 § 1915A(b)(1). Accordingly, the claims against Judge Dorsey are dismissed.

8 2. Claims Against Ms. Kirschner

9 Plaintiff brings similar claims against his court-appointed attorney, Assistant
10 Federal Public Defender C.B. Kirschner. Plaintiff alleges that Ms. Kirschner
11 violated his right to litigate without active interference by appearing without his
12 authorization in his habeas case. ECF No. 14 at 6. In addition, Plaintiff alleges that
13 Ms. Kirschner has violated the Nevada Rules of Professional Conduct by citing to
14 capital punishment cases as authority to “force counsel” on him; Plaintiff alleges
15 that Ms. Kirschner’s appearance as his attorney violates his right to petition the
16 government for redress of grievances and his right to litigate his own claims. *Id.*

17 As with the claims against Judge Dorsey, Plaintiff fails to state a cognizable
18 claim against Ms. Kirschner because he fails to meet the requirements of § 1983.
19 Plaintiff does not show that Ms. Kirschner acted under color of state law; indeed,
20 Ms. Kirschner acted pursuant to federal law in her representation of Plaintiff.
21 Furthermore, Plaintiff fails to show that Ms. Kirschner is a “person” for purposes
22 of § 1983. Ms. Kirschner is a federal employee and Plaintiff introduced no
23 evidence she acted in concert with the state or state employees. Accordingly,
24 Plaintiff fails to state a claim against Ms. Kirschner and the Court dismisses those
25 claims pursuant to § 1915A(b)(1).

26 3. Claims Against John and Jane Doe Attorneys

27 Finally, Plaintiff alleges the same claims against the John and Jane Doe
28 attorneys as he raised against Ms. Kirschner. ECF No. 14 at 7. No further facts are

1 provided to support these claims. For the reasons that the claims against Ms.
2 Kirschner are dismissed, Plaintiff's claims against the John and Jane Doe attorneys
3 are also dismissed. Plaintiff does not allege that the Doe attorneys acted under
4 color of state law or that they are "persons" for purposes of § 1983. Accordingly,
5 the Court *sua sponte* dismisses the claims against the Doe attorneys pursuant to its
6 authority under § 1915A(b)(1).

7 **Opportunity to Amend or Voluntarily Dismiss Complaint**

8 In general, leave to amend should be granted following dismissal of a
9 complaint unless it is absolutely clear that amendment would be futile. *Gordon v.*
10 *City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010); Fed. R. Civ. P. 15(a). As
11 discussed above, Plaintiff's claims against the various Defendants are dismissed
12 for failure to properly state a claim under § 1983. Accordingly, Plaintiff is granted
13 leave to amend his complaints so as to properly allege whether Defendants violated
14 his federal rights under color of state law. Plaintiff may submit an amended
15 complaint within **sixty (60) days** of the date of this Order which must include
16 sufficient facts to state a claim upon which relief may be granted.

17 Plaintiff's amended complaint shall consist of a **short** and **plain** statement
18 showing he is entitled to relief. Plaintiff shall allege with specificity the following:

- 19 (1) the names of the persons who caused or personally participated in
20 causing the alleged deprivation of his constitutional rights;
21 (2) the dates on which the conduct of each Defendant allegedly took place;
22 and
23 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

24 Furthermore, Plaintiff shall set forth his factual allegations in separate
25 numbered paragraphs. THIS AMENDED COMPLAINT WILL OPERATE AS A
26 COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE SUPPLEMENT
27 TO) THE PRESENT COMPLAINT. Plaintiff shall present his complaint on the
28 form provided by the Court. The amended complaint must be legibly rewritten or

1 retyped in its entirety, it should be an original and not a copy, it may not
2 incorporate any part of the original complaint by reference, and **IT MUST BE**
3 **CLEARLY LABELED THE “FIRST AMENDED COMPLAINT”** and cause
4 **number 2:19-cv-00084-SAB must be written in the caption.**

5 If Plaintiff fails to amend within sixty (60) days as directed, the Court will
6 dismiss the Complaint for failure to state a claim under 28 U.S.C. §§ 1915(e)(2)
7 and 1915A(b)(1). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a
8 prisoner, who brings three or more civil actions or appeals which are dismissed on
9 grounds they are legally frivolous, malicious, or fail to state a claim, will be
10 precluded from bringing any other civil action or appeal *in forma pauperis* “unless
11 the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. §
12 1915(g).

13 If Plaintiff chooses to amend his complaint and the Court finds the amended
14 complaint is frivolous, malicious, or fails to state a claim, the amended complaint
15 will be dismissed pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2). Such a
16 dismissal would count as one of the dismissals under 28 U.S.C. § 1915(g).
17 Alternatively, the Court will permit Plaintiff to voluntarily dismiss his Complaint
18 pursuant to Federal Rule of Civil Procedure 41(a). Plaintiff may submit the
19 attached Motion to Voluntarily Dismiss the Complaint within **sixty (60) days** of
20 the date of this Order or risk dismissal under 28 U.S.C. §§ 1915A(b)(1) and
21 1915(e)(2), and a “strike” under 28 U.S.C. § 1915(g). A voluntary dismissal within
22 this sixty (60) day period will not count as a strike.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Plaintiff’s Amended Complaint, ECF No. 14, is **DISMISSED without**
25 **prejudice.**

26 2. Plaintiff’s Motion for Temporary Restraining Order, ECF No. 15, is
27 **DENIED.**

28 3. Plaintiff’s Motion for Preliminary Injunction, ECF No. 16, is **DENIED.**

1 4. Any other outstanding motions are **DISMISSED as moot**.

2 **IT IS HEREBY ORDERED.** The District Court Clerk is hereby directed to
3 enter this Order and forward a copy to Plaintiff, along with a form Motion to
4 Voluntarily Dismiss Complaint and a civil rights complaint form.

5 **DATED** this 3rd day of December 2019.

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8 Stanley A. Bastian
9 United States District Judge
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